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In the Supreme Court of the United States

OCTOBER TERM, 1961

NO. — 685

STATE OF WASHINGTON, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN J. O'CONNELL,
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STATE PRINTING PLANT, OLYMPIA, WASH.

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STATE OF WASHINGTON, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The State of Washington, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 1, 1961.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 17), printed as Appendix A hereto, *infra*, p. 21, is reported *sub nom. United States v. Gas and Oil Development Co.*, in 126 F. Supp. 840 (1954). The

first opinion of the Court of Appeals, printed as Appendix B hereto, *infra*, p. 31, is reported in 233 F.2d 811 (1956). The second opinion of the Court of Appeals (R. 127), printed in Appendix C hereto, *infra*, p. 45, is reported in 294 F.2d 830 (1961).

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1961. R. 133; p. 54, *infra*. On November 22, 1961, the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit, extended the time within which to apply for a writ of certiorari from November 30, 1961, to and including January 29, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Jurisdiction of the District Court under 28 U. S. C. § 1345 was sustained by the Court of Apeals on the first appeal. *United States v. State of Washington*, 233 F.2d 811 (1956). The Court of Appeals had jurisdiction of the appeal under 28 U. S. C. § 1291.

QUESTIONS PRESENTED

1. Whether the federal courts must apply state law on the question of ownership or title to accreted lands formed along tidewater where the title to the adjoining uplands is in or was derived from the United States.

2. Whether the boundary between uplands and tidelands, apart from the matter of title to accretions, is to be determined in accordance with the common law as developed by the state courts, where state court decisions are not inconsistent with pre-statehood decisions of the federal court.

STATUTES INVOLVED

The statutory provisions involved are Laws of Washington 1901, chapter CV and CX, and Laws of Washington 1929, chapter 78. They are printed in Appendix F, *infra*, pp. 58-63.

STATEMENT

The United States brought this action against the State of Washington and others to quiet its title, subject to the rights of the heirs of Samson John, to accretions adjacent to ocean uplands owned by the United States. Judgment was entered quieting title in the United States, subject to the rights of Samson Johns, to all accretions formed prior to November 11, 1889, the date Washington became a state; and in the state to all accretions formed since that date. The dividing line between such accretions was held to be the line of ordinary high tide, defined as that line which the water had impressed on the soil as of November 11, 1889, by covering it for sufficient periods to deprive the soil of vegetation and destroy its value for agricultural purposes. The United States appealed. (R. 127, *infra*, pp. 45-46.)

The material facts are not in dispute. Lots 3 and 4 of Section 15 in Township 18 North of Range 12 West of the Willamette Meridian, adjacent to the Pacific Ocean in Grays Harbor County, Washington, belonged to the United States subject to a trust patent issued in 1916 to Samson Johns, a Quinault Indian, now deceased. As now extended, the trust period will expire in 1966. Samson Johns died in 1930, and his heirs have continued to reside on the property. (R. 127-128, *infra*, p. 46.)

The lots were at all times part of the public domain until patented to Samson Johns. In 1858 they were surveyed by the General Land Office, which established a meander line along and adjacent to the Pacific Ocean. Since 1858 the ordinary high-water mark in front of the lots has moved gradually seaward due to imperceptible accretion. On November 11, 1889, Washington was admitted to the Union as a state. (R. 128, *infra*, pp. 46-47.)

In holding that under the circumstances of this case the boundary between government-owned uplands and state-owned tidelands was the ordinary high-water mark as it was when Washington was admitted to the Union, the District Court applied what it understood to be a local rule of property established in the State of Washington. (R. 128, *infra*, p. 47.)

The testimony of Frank O. Sether, Assistant Commissioner of Public Lands for the State of Washington, given before the Master in Chancery

in February, 1954, sets forth the facts upon which the District Court's conclusion was based (R. 81, 99-116). His testimony concerned the long-standing administrative and judicial interpretation of state law concerning that portion of the shore and beach of the Pacific Ocean reserved by the state Legislature as a public highway by Laws of Washington 1901, chapters CV and CX (R. 99-116).

The Board of State Land Commissioners, for example, has always considered the reserved public highway created by Laws of Washington 1901, chapters CV and CX to be bounded on the landward side by the line of ordinary high tide as it existed on November 11, 1889, as indicated by the edge of vegetation. (R. 103-104, 106.)

The Attorney General for the State of Washington has also ruled that the reserved public highway encompassed the accreted area. (R. 116, State Exhibit K; *Opinions of the Attorney General, State of Washington*, 1927-1928, printed *infra*, p. 55.)

In addition, a vast amount of this accreted area in Grays Harbor County was sold by the state under Laws of Washington 1929, chapter 78, all of which is illustrated by maps (State Exhibits G and H; R. 104-107, 111-112). A list of the state's conveyances of the accreted area was also given in evidence (State Exhibit I; R. 111-112.)

Finally, that portion of the reserved public highway in Pacific County also involved accreted areas similar to the accreted area which lay in

front of the Samson Johns property (R. 112). In Pacific County numerous private actions to quiet title to upland property had been commenced in Superior Court. These actions quieted title in the state to all accreted areas lying seaward of the 1889 high tideline (R. 112-115). The areas affected were indicated on a map introduced in evidence (State Exhibit J; R. 112-114). The Findings of Fact, Conclusions of Law, and Judgments of that court in two subsequent cases of the same sort, decided June 5, 1959, and May 21, 1959, respectively, appear as Exhibits 1 a and 2 a to the Amended Pretrial Order which was entered after remand by the Court of Appeals following the first appeal (R. 29-40).

On appeal the United States contended that federal law instead of state law should have been applied, and that under federal law title to the accretions must be held to be in the United States, subject to the Samson Johns trust patent (R. 128). The Court of Appeals upheld the contention of the United States on the ground that the principle announced in *Borax, Ltd. v. Los Angeles*, 296 U. S. 10 (1935), required that the question of whether imperceptible accretions go with the uplands be determined in accordance with federal law when title to the uplands is in or derived from the federal government (R. 131, *infra*, p. 51). The Court of Appeals also upheld a further contention of the United States that the present line of mean high

tide as defined by the United States Coast and Geodetic Survey marked the boundary between the United States' property and the tidelands owned by the State of Washington. The court ruled that physical markings on the ground made by the water, such as the line of vegetation, does not properly define the high water mark. (R. 131-132, *infra*, pp. 52-53.)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in the instant case is in conflict with prior decisions of this Court.

The first issue before the court below concerned title to lands which, at the time of admission of the State of Washington into the Union, were tidelands but which thereafter slowly and imperceptibly became fast lands. The District Court had held that the State of Washington had not been divested of title to these tidelands because the common law doctrine of accretion had been modified by the state constitution, the judicial decisions of the state courts, and the statutes of the state legislature.

As the Court of Appeals viewed this first issue, however, state law was irrelevant (and was in fact not even discussed in its opinion) because "the upland owner is entitled to imperceptible accretions * * * because this is an attribute of title reserved to or obtained by grant from the Govern-

ment." (R. 129; *infra*, p. 48.) The premise necessarily involved in the court's reasoning is that the riparian or littoral right of title by accretion must remain exactly as it was under the common law as it existed prior to the existence of the State of Washington.

This is the first time that any court, state or federal, has reached such a conclusion. In every prior case in this Court, the question of whether the upland owner acquired title by accretion was made to depend upon operation of state law. *Pollard's Lessee v. Hagan*, 3 How. 212, 247 (1845); *Barney v. Keokuk*, 94 U. S. 324, 337 (1876); *St. Louis v. Rutz*, 138 U. S. 226, 250 (1891); *Joy v. St. Louis*, 201 U. S. 332, 342 (1906).

In addition, if the past decisions of this Court are to be limited as done by the court below, serious constitutional issues of infringement of the equal sovereignty of the State of Washington are raised.

This Court said, in *United States v. Louisiana*, 363 U. S. 1, 16 (1960), that:

> This Court early held that the 13 original States, by virtue of the sovereignty acquired through revolution against the Crown, owned the lands beneath navigable inland waters within their territorial boundaries, and that each subsequently admitted the State acquired similar rights as an inseparable attribute of the equal sovereignty guaranteed to it upon admission. *Pollard's Lessee v. Hagan*, 3 How. 212.

As an extension of this equal footing doctrine, it has consistently been held that rights and interests in tidelands are subject to local law. *Barney v. Keokuk*, 94 U. S. 324, 338 (1876); *Shively v. Bowlby*, 152 U. S. 1 (1894); *Hardin v. Jordan*, 140 U. S. 371, 382 (1891); *Port of Seattle v. Oregon & Washington R. Co.*, 255 U. S. 56, 63 (1921); *McGilvra v. Ross*, 215 U. S. 70, 79 (1909); *Mann v. Tacoma Land Company*, 153 U. S. 273, 283-4 (1894).

Even in *Borax, Ltd. v. Los Angeles*, 296 U. S. 10, 22 (1935), the principal authority relied upon below, it was said that:

> Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law.

Finally, we note that from the beginning the State of Washington has considered itself to be fully empowered, as sovereign, to take such action as it deemed desirable in so far as riparian rights, including the matter of accretions, were concerned. *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539 (1891). This was done on the ground that the control of riparian and littoral rights is an incident of each state's sovereignty, to be settled by the respective states themselves, unlimited by the power of the Congress of the United States to make all needful rules and regulations for the sale and disposition of the public lands of the United States. *Eisenbach v. Hatfield*, *supra*, at 242, 246.

2. The rule of *Borax, Ltd. v. Los Angeles*, 296 U. S. 10 (1935), should not be applied in the State of Washington because Washington has developed its own common law rule which is consistent with the pre-statehood decisions of this Court.

The second issue before the court below concerned the location of the high-water mark which divides tidelands from uplands: Does this mark consist of physical markings upon the ground, as the courts of the State of Washington hold, or is this mark the line of mean high tide as computed by the United States Coast and Geodetic Survey, as once held by this Court in *Borax, Ltd. v. Los Angeles*, *supra*, at pp. 26-27, and the court below in the instant case?

Washington was admitted into the Union on November 11, 1889. As sovereign, it succeeded to the sovereignty and jurisdiction over tidelands to the same extent as such authority existed in the original states, the sovereignty and jurisdiction of the original states being governed by the common law as modified by the institutions of the new nation. *Pollard's Lessee v. Hagan*, 3 How. 212, 228-229 (1845).

In *Borax, Ltd. v. Los Angeles*, 296 U. S. 10 (1935), this Court held that the extent of the tide-

Shelton Logging Co. v. Gosser, 26 Wash. 126, 66 Pac. 151 (1901); *Harkins v. Del Pozzi*, 50 Wn. 2d 237, 310 P. 2d 532 (1957).

Our question here assumes a prior determination as to ownership of the accretions. If the State of Washington owns them, the high-water mark will constitute a fixed boundary permanently located as it existed on the date Washington was admitted to statehood; if the United States owns the accretions, the high-water mark will be a moving boundary subject to further change.

lands which each state acquires under the foregoing equal footing doctrine is a federal question where, at the time of statehood, title to the adjoining uplands is in the United States.

But the federal question, it would seem, goes no further than to require that each state confine its claims to the limits of the common law. The federal question should not be extended to the point that state courts are divested of their right to develop the common law, nor should the federal courts proceed without recognition of the state court decisions. In fact, the Rules of Decision Act, 28 U. S. C. § 1652, provides that the state court decisions shall be regarded as rules of decision in federal courts unless the Federal Constitution, treaties, or Acts of Congress otherwise require or provide.

Needless to say, there is no constitutional or statutory provision requiring or providing that state court decisions should not be incorporated or adopted by federal law in the matter of defining the high-water mark which fixes the boundary of the tidelands acquired by the State of Washington upon its admission to the Union in 1889.

The Washington rule is perfectly consistent with this Court's statement of the extent of the state's claim to tidelands as the common law was understood at about the date of Washington statehood. In *San Francisco v. LeRoy*, 138 U. S. 656 (1891), it was said (at pp. 671-672):

> The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tides, but only those over which tide-water flowed so continuously as to prevent their use and occupation. To render lands tide-lands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tide-water over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses, or other uses to which up-land is applied.

3. The questions involved in this case are important.

In 1901, the state legislature dedicated much of the shore and beach of the Pacific Ocean to the public as a highway to remain forever open. Laws of Washington 1901, chapters CV and CX, *infra*, pp. 58-61. The dedication as made under these acts extends from the Columbia river or Cape Disappointment on the south to a point 300 feet southerly of the government jetty at Peterson's Point on the north, and from Damon's Point on the north side of the entrance to Grays Harbor north to the mouth of the Queets river, a total distance of approximately 60 miles.

The reservation made by the 1901 acts was not for a highway in the sense of a road. It was a highway only in the sense that it was an area to be kept open for the accommodation of the public. As explained by Judge Fullerton in his dissent from

the departmental opinion in *Williams Fishing Co. v. Savidge*, 152 Wash. 165 at 181, 277 Pac. 459 at 464 (1929):

> Prior to the year 1901, when the legislature declared the tide lands to be a public highway, the beach had become a favored resort for the people of the state who were seeking rest and recreation, and, as I gather from the surroundings and the current history of the times, the purpose of the legislature was not so much to establish a thoroughfare as it was to preserve the beach as a recreational ground for the use of the public.

The inner or land boundary of the lands so dedicated included accretions that had formed since statehood. This has been the long-held view of the attorney general of the state. For example, in 1928 this question was presented to him in connection with the possibility of abating certain shacks upon the accreted lands on the ground that they constituted a nuisance. See *Opinion of the Attorney General to the Prosecuting Attorney, Aberdeen, Wn.*, offered and admitted in evidence before the Master (R. 116) as State's Exhibit K. (This exhibit is set forth as Appendix E to this petition, *infra*, p. 55.)

The legislature was of the same opinion. In 1929 it changed the inner line of the northerly portion of the highway reservation (that part within Grays Harbor County), making it the "line of ordinary high tide as the same is now located or as it may hereafter exist." Laws of Washington 1929,

chapter 78, printed herein, *infra*, p. 61. This change in the inner boundary in Grays Harbor County was made so that the state might sell accreted lands between the original inner or landward boundary, and the new boundary. Chapter 78, *supra*.

The commissioner of public lands sold great quantities of the accreted lands under authority of this law. State's Exhibits G and H, show graphically the property sold under chapter 78, Laws of Washington 1929 (R. 104-105, 106-111). State's Exhibit I is a list of the more than 70 deeds issued by the state under the enactment prior to the time of the hearing before the Master in February and March of 1954 (R. 105-106).

In Pacific County, the southerly portion of the highway reservation, there is no enactment comparable to chapter 78, Laws of Washington 1929. Consequently, no sales of accreted lands have there been made by the state. However, numerous upland property owners have brought suit to establish the inner boundary of the highway reservation in that county.

The assistant commissioner of public lands prepared a map showing the litigation involving this boundary. This map, State's Exhibit J, clearly shows the number of lawsuits (more than 40) and extent of private ownerships which had been limited to the 1889 high-water mark (as defined by the line of vegetation) by judgments and decrees of

the Pacific County superior court entered prior to March, 1954 (R. 112-114).

While the instant lawsuit directly affected only the accreted lands and the high-water mark in front of two Government lots owned by the United States subject to a trust patent, the opinion of the Court of Appeals indirectly affected the entire highway reservation.

In Grays Harbor County, where the highway has been narrowed by the 1929 act, the inner boundary of the highway reservation would be the present line of mean high tide rather than the present vegetation line. The difference between the two lines is approximately 350 feet according to the government's witness (R. 94-95).

In Pacific County, where the highway has not been narrowed, the inner boundary of the highway reservation would be moved seaward an additional distance so as to make the accreted lands formed since statehood a part of the uplands rather than a part of the highway reservation.

The opinion of the Court of Appeals indirectly affects the title of all persons who claim ownership of accreted lands by virtue of deeds executed under chapter 78, Laws of Washington 1929. If the state did not own these accreted lands, it then had no title it could grant; its deeds conveyed no interest to the grantees named.

Finally, it should be noted that the opinion of the Court of Appeals indirectly affects the title of

persons who have purchased tidelands from the state. Heretofore, the local rule had been that the boundary between tidelands and uplands was the line of vegetation. Under the opinion of the Court of Appeals in the instant case, this boundary should be the line of mean high tide. The question of the proper boundary will remain in doubt until such time as this Court resolves the conflict between the local state rule and the rule applied by the Court of Appeals.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney General.

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Assistant Attorney General.

Counsel for Petitioner.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

Civil No. 1529

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

GAS & OIL DEVELOPMENT CO., a corporation; UNION OIL COMPANY OF CALIFORNIA, a corporation; JAMES E. HILL and GRAYS HARBOR COUNTY; TOM HAWKSWORTH, LOS NIETOS COMPANY, a corporation; and ALL PERSONS CLAIMING AN INTEREST IN REAL PROPERTY HEREIN DESCRIBED,

Defendants,

STATE OF WASHINGTON and GRAYS HARBOR COUNTY; LOUISE NAPOLEON JOHNS, HARVEY JOHNS, EMILY JOHNS, FLOYD JOHNS, LAVINA (LAURA JOHNS) McLEOD, FLORA STROM and VANCE JOHNS (a minor),

Additional Defendants.

June 29, 1954

BOLDT, District Judge.

The original complaint in this equity proceeding seeking to quiet title to property described in the complaint in the United States as trustee for certain Indian wards was filed November 29, 1951.

Three amended complaints were filed, the third on April 24, 1952. Thereafter additional parties were brought in by answer and cross-complaint of defendant Gas & Oil Development Company. Motion of defendant State of Washington to dismiss the action as to the State for want of jurisdiction of the subject matter and of the State was served February 2, 1952 and filed May 22, 1952. By an order entered on June 3, 1952, on the application of defendants Hawksworth and Gas & Oil Development Company, a receiver was appointed by the Honorable James M. Carter, then sitting in this Court by assignment. The receiver was directed by the order to assume control over the real property and improvements involved in the action for preservation during pendency of the litigation and to provide financing for continued oil exploration and production on said property subject to the order of the Court.

The transcript of the several hearings before Judge Carter prior to the appointment of the receiver indicates that although the State's motion to dismiss was called to the Court's attention no hearing thereon was had or requested and no objections were made to the appointment of the receiver. Thereafter Judge Carter heard various matters relating to the receivership, including a hearing in Los Angeles and authorization for a contract by the receiver with Ocean City Oil Fields, Inc. for extensive oil drilling operations, all without further objection to jurisdiction. The present judge

first heard matters in this case on September 18, 1953 following the filing on September 12, 1953 of a stipulation and order transferring jurisdiction of the receivership and all matters incident thereto from Judge Carter to the present judge. The stipulation was signed by counsel representing all parties, including the State of Washington. At the commencement of the hearing on September 18, 1953, following examination of the voluminous files, the Court specifically enumerated all of the undetermined matters for consideration and determination of the Court at that date. Such enumeration did not include a challenge to the jurisdiction of the Court and such challenge was not mentioned in response to the Court's inquiry as to whether any matters had been overlooked or omitted in the enumeration.

At the September 18, 1953 hearing, forfeiture of a $25,000 cash performance bond deposited with the receiver pursuant to the Oil City Fields, Inc. contract was ordered at the instance of the adverse parties, including the State of Washington, and order to such effect was entered October 5, 1953. At the next hearing before the present judge on October 21, 1953 an enumeration of matters then to be heard did not include a challenge to jurisdiction and again the Court was not asked to consider such challenge.

On October 28, 1953 a hearing on the receiver's report was had, the report approved, and allow-

ance of receiver's fee authorized without objection by the State of Washington. On February 1, 1954 a master was appointed to take evidence and report as directed in the order, such order being drafted, approved and presented for entry by counsel for the State of Washington. The master's report was filed May 4, 1954; a supplemental report was filed June 16, 1954 correcting the original report in certain particulars and at the hearing on the State's objections to the report the master was directed to take evidence and report on additional facts; the report thereon was filed June 28, 1954. The cause came on for trial June 22 and 23 but no additional evidence was presented to the Court following the hearing on the master's report. With the corrections provided for in the master's supplemental report and the additional facts found by the master as directed, no objection by any party as to the facts found by the master remains to be determined. Accordingly, such facts are accepted and found by the Court and the master's report with respect to the following findings of facts is approved in entirety:

During his lifetime Samson Johns was an enrolled Indian of the Quinault Tribe and settled upon lots 3 and 4, Sec. 15, Township 18 North, Range 12, W.W.M., Grays Harbor County, State of Washington. He married about the year 1880, raised a family and continuously resided on the premises until his death in 1930. Since the date of his death his heirs, Louise Napoleon Johns, Harvey

Johns, Emily Johns, Floyd Johns, Lavina McLeod, Flora Storm and Vance Johns, have been in possession of the lands. Samson Johns made final proof by affidavit dated August 11, 1899, and on September 7, 1900 the Secretary of the Interior issued a fee simple patent covering lots 3 and 4 pursuant to the provisions of the Act of May 20, 1862, and his patent was duly recorded in the General Land Office (Washington Vol. 131, p. 337). In the year 1916 the Secretary of the Interior cancelled the fee simple patent and issued to Samson Johns a trust patent in lieu thereof covering the same lands, the trust period to expire in the year 1966. The lands are bounded on the west by the Pacific Ocean, and since Samson Johns' occupation there have been considerable accretions caused by the action of the ocean. Between the years 1858 and 1880, both dates inclusive, the accretions to lots 3 and 4 were approximately 50 acres, and during the years 1858 to 1900, both dates inclusive, the accretions to the lots were approximately 56 acres. The Gas & Oil Development Company and the Union Oil Company have drilled two oil wells on the accreted lands, known as State Oil Wells Nos. 3 and 4, under leases or permits from the State of Washington. Oil was discovered on the accreted lands.

Based on such facts the general issues of law for determination are: (1) whether this Court is without jurisdiction to hear the cause because the State has not consented to be sued and under the Federal Constitution only the United States Supreme

Court has original jurisdiction where a state is a party and no substantial question arising under the constitution and laws of the United States is involved; (2) whether the United States has capacity to sue in this cause; and (3) what rule as to real property boundary under Washington State law is applicable to the facts in this case.

While no specific order or ruling on the State's motion to dismiss is found in the record, it appears by clearest implication that Judge Carter found and held that the controversy presented was within the jurisdiction of the Court and that the State of Washington consented to be and remain a party to the action. The appointment of a receiver and the several extended hearings incident thereto, all without objection by the State, are inconsistent with any other conclusion. Under the circumstances the present judge ought not to review such holding.

> " * * * Upon the settled rule of 'stare decisis', in the absence of cogent reasons for departing therefrom, the prior ruling of this court controls the disposition of the motion here." U. S. v. Choy Kum, D. C. N. D. Cal. S .D. 1950, 91 F. Supp. 769, 770.
>
> "Judges of coordinate jurisdiction should not ordinarily overrule decisions of their associates based on the same set of facts, unless required by higher authority." U. S. v. Firman, D. C. W. D. Pa. 1951, 98 F. Supp. 944, 946.
>
> " * * * One judge will not review the rulings of another in the same court." Taylor v. Decatur Mineral & Land Co., C. C. N. D. Ala. N. D. 1901, 112 F. 449.

By joining in and assenting to the appointment of a receiver and the extended hearings incident thereto and in the appointment of a master and the various matters relating thereto, the State became an active participant in the litigation and thereby consented to be sued in this action and submitted to jurisdiction of this Court.

The United States affirmatively pleaded and proved the regular issuance in 1900 of a fee title patent to the lots described in the complaint. Under such patent the land was not held in trusteeship by the plaintiff and without more the United States would have no capacity to sue and the State's motion for summary judgment on that ground would have to be sustained. The United States also pleaded and proved the administrative cancellation of the fee title patent and the issuance in 1916 of a trust patent. If the first patent was legally cancelled and the second be valid the United States does have capacity to sue. The State cites United States v. Stone, 2 Wall. 525, 17 L.Ed. 765, and many other United States Supreme Court decisions to the effect that a patent regularly issued and delivered by the United States, without defect on its face, cannot be affected by administrative action and can only be set aside by court decree in an appropriate proceeding. Plaintiff contends that the substitution of the second patent for the first is validated in law by the 1915 decree of this Court in U. S. v. Chehalis County, Cause No. 10-E of this District, and further because the substitution was voluntarily accepted

and consented to by the patentee. The patentee was not a party to the Chehalis County case and there is no evidence sufficient to establish either that the patentee was in privity with any party in that case or that a legally valid voidance of the first patent and acceptance of the second was accomplished by affirmative action of the patentee. Neither ground urged in support of plaintiff's position can be sustained. Inasmuch as the defect in plaintiff's capacity to sue is shown by plaintiff's own pleading and proof, such defect is available to the State even though it does not have or claim any interest in the specific lots referred to in the complaint apart from the accretions thereto.

If desired, all of the issues in the present case, without question as to jurisdiction or capacity to sue, could be determined directly and expeditiously in an action by the individual Indian claimants brought in the State Superior Court as authorized by R. C. W. 4.92.010. If there be any question as to the decree entered by this Court being res judicata as to the invalidity of the purported patent substitution, the United States as trustee can join in the action under the Washington Rules of Procedure. In such an action, the state courts as final arbiters of state law can determine the applicable boundary rule, which, as hereinafter noted, has never been directly passed on by the Washington Supreme Court.

This Court's discussion of the applicable boundary line rule will be dictum in view of the conclusion reached as to the incapacity of plaintiff to maintain the action; accordingly, comment on such issue will be brief. In Ghione v. State, 1946, 26 Wash. 2d 635, 175 P. 2d 955, Hirt v. Entus, 1950, 37 Wash. 2d 418, 224 P. 2d 620, and Harris v. Swart Mortgage Co., 1952, 41 Wash. 2d 354, 249 P. 2d 403, the Washington Supreme Court unequivocally adopted the "moving boundary" rule as to lands in and adjoining navigable rivers. The same clause of Article XVII, Sec. 1 of the Washington Constitution reserves title in the State both to land on navigable rivers and to tidelands, and from that circumstance it might be inferred that the moving boundary rule would apply to tidelands as well as to river lands. However, the Ghione, Hirt and Harris cases were concerned solely with riverbed lands and the language of the decisions is strictly limited to such. Washington law, whether legislative enactment or court decision, is controlling as to either class of lands. It does not appear that any Washington legislation has ever been enacted directly or indirectly dealing with the boundary rule applicable to riverbed lands, whereas the contrary is true of tidelands. As far back as 1899, prior to the issuance of the first patent involved in this case, the Washington legislature unmistakably indicated its view that the moving boundary rule did not apply to tidelands. The Laws of 1899, Ch. 83, p. 132 the

substance of which is now contained in R. C. W. 79.16.360, provides as follows:

> "All tide and shore lands except as herein expressly provided shall be sold upon the terms provided for the sale of school and granted lands, * * * * Provided, That any accretions that may be added to any tract or tracts of tide or shore lands heretofore sold or that may hereafter be sold by the state shall belong to the state, and shall not be sold or offered for sale until the said accretions shall have been first surveyed and platted under the direction of the commissioner of public lands, and the adjacent owner shall have the preference right to purchase said lands for thirty days after the same shall be offered for sale: Provided further, * * * [relating to appeals]."

Various other provisions of Washington legislation, including dedication of a portion of the accreted tidelands as a public highway, are to the same effect. Under the quoted Act a vast amount of Washington tidelands has been sold to private ownership; in fact the patentee in the present case entered into a contract, later defaulted, for the purchase of the very accreted lands now in dispute. It is the opinion of this Court that when directly called upon to decide the question the Washington Supreme Court will not apply the rule of the Ghione, Hirt and Harris cases to accreted tidelands of the character of those involved in this case.

The remaining matters requiring disposition prior to entry of decree in accordance herewith are those relating to the tax liability of the receiver and disposition of the balance of funds held by him. For

the protection of all concerned, entry of decree will await final determination of the matters referred to.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 14,715

UNITED STATES OF AMERICA, *Appellant*,

vs.

STATE OF WASHINGTON, GAS AND OIL DEVELOPMENT COMPANY, a Corporation, UNION OIL COMPANY OF CALIFORNIA, a Corporation, GRAYS HARBOR COUNTY, LOS NIETOS COMPANY, a Corporation, TOM HAWKSWORTH and JAMES E. HILL,

Appellees.

May 14, 1956

Rehearing Denied June 15, 1956

Before: STEPHENS and POPE, Circuit Judges, and MATHES, District Judge.

MATHES, District Judge.

The Government appeals from a judgment dismissing "with prejudice", after trial, an action against the State of Washington and the other appellees to quiet the title to certain Washington real property claimed by the United States of America as trustee for certain Indian wards.

Jurisdiction was invoked under 28 U. S. C. § 1345, but the assertion of jurisdiction is challenged at the outset with the claim that, by virtue of sovereign immunity, the District Court had no jurisdiction over the person of the State of Washington.

The argument is that since the Constitution provides that: "In all Cases * * * in which a State shall be Party, the Supreme Court shall have original Jurisdiction", U. S. Const. art. III, § 2, cl. 2, it follows that: "For a State to be sued in any forum other than the United States Supreme Court it must consent thereto."

Since Ames v. Kansas, 1884, 111 U. S. 449, 4 S. Ct. 437, 28 L. Ed. 482, it has been held to be "within the power of congress to grant to the inferior courts of the United States jurisdiction in cases where the supreme court has been vested by the constitution with original jurisdiction." 111 U. S. at page 469, 4 S. Ct. at page 447; see: Case v. Bowles, 1946, 327 U. S. 92, 66 S. Ct. 438, 90 L. Ed. 552; State of New York v. United States, 1946, 326 U. S. 572, 66 S. Ct. 310, 90 L. Ed. 326; United States v. State of Montana, 9 Cir., 134 F. 2d 194, 196, certiorari denied, 1943, 319 U. S. 772, 63 S. Ct.

1438, 87 L. Ed. 1720; Hart and Wechsler, The Federal Courts and The Federal System 228 (1953).

Section 1251(b) (2) of revised Title 28 of the United States Code provides that: "The Supreme Court shall have original but not exclusive jurisdiction of: * * * All controversies between the United States and a State * * * *."

And 28 U. S. C. § 1345 declares that: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States * * *."

The suit at bar to quiet title in the Government in trust for certain Indian wards is clearly an action "commenced by the United States" within the meaning of § 1345. Cf. United States v. Minnesota, 1926, 270 U. S. 181, 46 S. Ct. 298, 70 L. Ed. 539. Accordingly the District Court correctly assumed jurisdiction over the person of the State of Washington. United States v. California, 1936, 297 U. S. 175, 187-189, 56 S. Ct. 421, 80 L. Ed. 567.

It is alleged in the complaint that prior to 1858 the land in question was ceded to the United States by treaty with the Indians; that thereafter a Government survey of the land was made and this survey showed the west boundary line of the land to be "the high water mark of the Pacific Ocean."

The complaint continues: "That one Samson Johns, a member of the Quinaielt Tribe of Indians, settled upon lots 3 and 4; * * * about the year

1880, said lots at that time being a part of the public domain of the United States and subject to entry by Indians and members of the Indian tribes under and pursuant to the homestead laws of the United States; that he made final proof by an affidavit dated May 30, 1889; that on September 7, 1900, the Secretary of the Interior erroneously issued to him a fee simple patent covering the land pursuant to the provisions of the Act of May 20, 1862 (12 Stat. 392) * * *"

It is next alleged that "the Secretary of Interior in 1916 cancelled the fee simple patent theretofore issued to Samson Johns and issued to him in lieu thereof a trust patent for said lots 3 and 4, * * * under the provisions of the Act of Congress of July 4, 1884 (23 Stat. 96); that the trust patent so issued provided, in conformity with the 1884 Act, that the land would be held in trust by the United States for a period of 25 years which trust period has from time to time been extended by Executive Orders for additional periods of 25 years each; and that said trust * * * is now in effect and will not expire until the year 1966."

It is further alleged: "That since said Samson Johns went into possession of said * * * real property which is bounded on the west by the Pacific Ocean, there has been added thereto by the action of the Pacific Ocean approximately sixty acres of new land * * * commonly known as the accreted land, which has become attached to and is in fact a part of said Lots 3 and 4 * * *"

The complaint concludes with the allegations: "That said Samson Johns with his family, and since his death in 1930, his children and heirs * * * have at all times since 1880 continuously occupied and do now occupy and reside on said real property." Further: that appellees "claim some right, title or interest in and to the accreted land attached to said Lots 3 and 4"; that certain of appellees "have drilled * * * oil and gas wells" on the accreted land "under a claim of right alleged to have been obtained from the State of Washington" by virtue of certain "leases, permits or other instruments" which "the State * * * was without legal authority to enter into or make * * * *"

The State of Washington answered asserting ownership of the accreted lands and alleging *inter alia* that the United States is "not a real party in interest", and: "That the fee patent issued to Samson Johns pursuant to the General Homestead Laws of the United States on September 7, 1900, was and is valid and * * * any purported acts by the Secretary of the Interior to cancel and annul the same are void and of no effect. * * * and that if said patent was not properly issued under the General Homestead Laws the same was properly issued under the Act of March 3, 1875, (43 U. S. C. A. Sec. 189) which act would provide a trust of five years' duration which trust period has long since expired."

The District Court ordered the cause referred to a Master "to hear, determine, and examine all

evidence and legal authorities touching the issues * * * " Fed. R. Civ. Proc. Rule 53, 28 U. S. C. A. The Master reported the facts to be substantially as alleged by the Government, and concluded: that "the fee patent of 1900 was superseded by the trust patent issued in 1916"; that the Government had capacity to sue; and that: "The owner of the accreted lands is the United States of America in trust for the Indian heirs * * * "

Objections to the report were filed, and the matter was then referred back to the Master for consideration of the objections and "any additional points of law raised in briefs, and for review and report thereon." The Master then made further report, and the District Court adopted the Master's findings "as corrected and supplemented."

The District Court found further that: "The fee patent of 1900 was regular on its face and was issued in accordance with the homestead application of Samson Johns which application was made under the General Homestead Laws of the United States of 1862. Under such patent the land was not held in trust."

From this finding the learned District Judge concluded that "the defect in plaintiff's capacity to sue is shown by plaintiff's own pleading and proof * * * " and accordingly dismissed the action. See United States v. Gas & Oil Dev. Co., D. C. W. D. Wash. 1954, 126 F. Supp. 840, 844.

Section 1 of the General Homestead Act of May 20, 1862 expressly limited the benefits of the statute to every person "who * * * is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws * * * *" 12 Stat. 392 (1862).

The 1900 patent in question was issued over the signature of President William McKinley "pursuant to the Act of Congress approved 20th May, 1862, 'To secure Homesteads to Actual Settlers on the Public Domain', and the acts supplemental thereto * * * *"

First of "the acts supplemental thereto" was the Act of March 3, 1875, 18 Stat. 402, which extended the benefits of the Homestead Act of 1862 to certain Indians, namely, to "any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned * * * his tribal relations." 18 Stat. 420, § 15 (1875), 43 U. S. C. A. § 189.

Next of "the acts supplemental thereto" was the Act of July 4, 1884, 23 Stat. 76, § 1 of which provided: "That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens

of the United States * * * but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever." 23 Stat. 96 (1884), 43 U. S. C. A. § 190.

Third of "the acts supplemental" to the Homestead Act of 1862 was the Act of February 8, 1887, which provided that "every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens * * *" 24 Stat. 388, 390 (1887), 8 U. S. C. A. note 81 following § 1401.

It is clear from the language of the Homestead Act of 1862 that before Samson Johns could have qualified under that Act for issuance of a patent

to the 80-acre tract involved here, it would have been necessary for him to make proof: (1) that he was a citizen of the United States; and (2) that he had paid the fees required by law. [See: 12 Stat. 392, § 1 (1862); id. 393, § 6.]

And it is equally clear that before Samson Johns could have qualified for a five-year trust patent under the Act of March 3, 1875, it would have been necessary for him to make proof: (1) that he was an "Indian born in the United States, who is the head of a family * * * and who has abandoned * * * his tribal relations * * *", and (2) that he had paid the fees required by law. [See: 18 Stat. 420 (1875); 12 Stat. 393, § 6, (1862).]

But in order to qualify for the trust patent provided under the Act of July 4, 1884, it was not necessary to prove either (1) that he was a citizen, or (2) that he had abandoned his tribal relations, or (3) that he had paid any fees. For the 1884 statute opened the public domain to entry for homestead by all "Indians * * * located on public lands * * *", and provided that "no fees or commissions shall be charged on account of said entries or proofs." [See 23 Stat. 96 (1884), 43 U. S. C. A. § 190.]

In his "Homestead Proof-Testimony of Claimant" executed August 11, 1899, Samson Johns swore that he was an Indian, born in the State of Washington, and the head of a family, and that he had

"severed all * * * tribal relations." The Master found as a fact that "Samson Johns was an enrolled Indian of the Quinaielt Tribe during his lifetime", and reported as his "conclusion of law" that "Samson Johns did not sever his tribal relations with the Quinaielt Tribe of Indians."

It does not appear in the record before us that the learned District Judge made any finding at all as to whether or not Johns, at the time in question, had severed or "abandoned * * * his tribal relations", within the meaning of the 1875 Act, 18 Stat. 420, 43 U. S. C. A. § 189, or had become a citizen of the United States under the above-quoted provisions of the Act of February 8, 1887, 24 Stat. 388, 390 (1887).

But even assuming *arguendo* that Johns had become a citizen under the 1887 Act, the finding of the trial court that the "fee patent of 1900 was * * * issued * * * under the General Homestead Laws * * * of 1862 * * * [and] under such patent the land was not held in trust", must nonetheless be held "clearly erroneous." Fed. R. Civ. Proc. Rule 52(a), 28 U. S. C. A.

Absent evidence to the contrary, the applicable presumption is that the ordinary course of business was followed and that the law was obeyed; also that official duty was regularly and faithfully performed. United States v. Crusell, 1871, 14 Wall. 1, 4, 81 U. S. 1, 20 L. Ed. 821; President, Directors & Co. of United States Bank v. Dandridge, 1827, 12 Wheat. *64

69, 25 U. S. 64, 6 L. Ed. 552; Cavness v. United States, 9 Cir., 187 F. 2d 719, 723, certiorari denied 1951, 341 U. S. 951, 71 S. Ct. 1019, 95 L. Ed. 1374.

Here the uncontradicted evidence in the form of two official receipts discloses that "no fees or commissions" were exacted from "Samson Johns (an Indian)." As stated above, before any patent granting fee simple title could lawfully have issued under the 1862 Act, the statutory fees were required to be paid. [See: 12 Stat. 392, § 1 (1862); id. 393, § 6.]

Assuming then that Johns had acquired the status of a citizen of the United States under the Act of 1887, a fee patent could not lawfully have issued without payment of the statutory charges. Cf. United States v. Krause, D. C. W. D. La. 1950, 92 F. Supp. 756, 760.

The same is true with respect to any patent under the 1875 Act; for even assuming that Johns had "abandoned * * * his tribal relations", a five-year trust patent could not lawfully have issued under the 1875 Act without payment of the statutory fees. [See: 18 Stat. 420 (1875), 43 U. S. C. A. § 189; 12 Stat. 392, § 1 (1862); id. 393 § 6; cf. 43 U. S. C. § 179.]

It necessarily follows that only under the 1884 Act—requiring no proof of American citizenship, or of abandonment of tribal relations, and declaring that "no fees or commissions shall be charged"—could a patent for the land in question lawfully have issued to Samson Johns.

And by the same token, only with the 25-year-trust-provision as required by law, 43 U. S. C. A. § 190, could any valid patent have issued to Johns. The 1900 fee patent must then either be read as containing the trust provision required by the 1884 statute, or be considered a nullity.

As said in United States v. Stone, 1864, 2 Wall. 525, 69 U. S. 525, 17 L. Ed. 765: "The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority." 69 U. S. at page 535.

It is true of course, in "a case in which the officers of the department have acted within the scope of their authority", Moore v. Robbins, 1877, 96 U. S. 530, 532, 24 L. Ed. 848, a patent once issued passes beyond the control of the executive branch of the Government. Bicknell v. Comstock, 1885, 113 U. S. 149, 5 S. Ct. 399, 28 L. Ed. 962; United States v. Schurz, 1880, 102 U. S. 378, 26 L. Ed. 167. But here the officers acted, not only without authority, but contrary to the plain mandate of the statute, in issuing the 1900 patent without the requisite trust provision. Cf. Germania Iron Co. v. United States, 1897, 165 U. S. 379, 17 S. Ct. 337, 41 L. Ed. 754.

And since the agent of the Government who issued the 1900 patent "was obviously without authority to dispose of the lands" to the fee title, the

Government cannot be held estopped "from asserting rights of the United States in its mineral rights which he could not surrender." State of Utah v. United States, 1932, 284 U. S. 534, 545-546, 52 S. Ct. 232, 76 L. Ed. 469.

For it is settled that "the United States is neither bound nor estopped by acts of its officers or agents * * * to do or cause to be done what the law does not sanction or permit." Utah Power & Light Co. v. United States, 1917, 243 U. S. 389, 409, 37 S. Ct. 387, 391, 61 L. Ed. 791.

Accordingly we hold that the 1900 patent must be read as containing the 25-year-trust-provision required by the 1884 Act; and that the patent issued February 5, 1916, "in lieu of the one dated September 7, 1900" is valid. United States v. Joyce, 8 Cir., 1917, 240 F. 610, 615; Eels v. Ross, 9 Cir., 1894, 64 F. 417, 420.

As the learned District Judge found, the trust period of the 1916 patent has been extended until 1966. 25 U. S. C. A. § 391; United States v. Jackson, 1930, 280 U. S. 183, 50 S. Ct. 143, 74 L. Ed. 361. The Government is therefore "the real party in interest" in prosecuting this action to quiet the title to the land in question for the benefit of the Indian wards, the heirs of Samson Johns. Fed. R. Civ. Proc. Rule 17 (a), 28 U. S. C. A.; United States v. Minnesota, supra, 270 U. S. at pages 193-194, 46 S. Ct. 298; cf. Cramer v. United States, 1923, 261 U. S. 219, 232, 43 S. Ct. 342, 67 L. Ed. 622; Heckman v.

United States, 1912, 224 U. S. 413, 444-445, 32 S. Ct. 424, 56 L. Ed. 820.

The Government urged in the trial court that the findings and decree of the District Court annulling a claimed 1897 tax lien on the land are res judicata, and so determinative of the issue as to the title of the United States. That decree was rendered in a suit brought by the United States against the County of Chehalis, Washington, the County Treasurer, the County Assessor, and the Board of County Commissioners.

The specific contention is that the State is privy to that judgment, and so estopped to deny the title of the United States. The conclusions we have reached render it unnecessary to express an opinion on the question. See: State v. Pacific Tel. & Tel. Co., 1943, 9 Wash. 2d 11, 113 P. 2d 524; Ewald's Ex'r and Trustee v. Louisville, 1921, 192 Ky. 279, 232 S. W. 388; People ex rel. Bryant v. Holladay, 1892, 93 Cal. 241, 29 P. 54.

Nor do we reach on this record the question as to ownership of the accreted land. See: United States v. Gas & Oil Dev. Co., supra, 126 F. Supp. at pages 844-845; cf. Mann v. Tacoma Land Company, 1894, 153 U. S. 273, 14 S. Ct. 820, 38 L. Ed. 714.

The findings and judgment are vacated and the cause remanded for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 17,006

UNITED STATES OF AMERICA, *Appellant*,

vs.

STATE OF WASHINGTON, *Appellee*.

Sep. 1, 1961

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

Before: CHAMBERS, ORR and HAMLEY, Circuit Judges

HAMLEY, Circuit Judge:

The United States brought this action against the State of Washington and others to quiet its title, subject to the rights of the heirs of Samson Johns, to accretions adjacent to ocean uplands owned by

plaintiff. Judgment was entered quieting title in the United States, subject to the rights of the heirs of Samson Johns, to all accretions formed prior to November 11, 1889, when Washington became a state, and in the State to all accretions formed since that date. The dividing line between such accretions was held to be the line of ordinary high tide, defined as that line which the water had impressed on the soil as of November 11, 1889, by covering it for sufficient periods to deprive the soil of vegetation and destroy its value for agricultural purposes. The Government appeals.

The material facts are not in dispute. Lots 3 and 4 of section 15 in township 18 north of range 12 west of the Willamette Meridian, adjacent to the Pacific Ocean in Grays Harbor County, Washington, belong to the United States, subject to a trust patent issued in 1916 to Samson Johns, a Quinault Indian, now deceased. As now extended, the trust period will expire in 1966. Samson Johns died in 1930, and his heirs have continued to reside on the property.

The lots were at all times part of the public domain until patented to Samson Johns. In 1858 they were surveyed by the General Land Office, which established a meander line along and adjacent to the Pacific Ocean. Since 1858 the ordinary high water mark in front of the lots has moved gradually

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[1] Jurisdictional aspects of this litigation were dealt with in United States v. Gas & Oil Development Co., 126 F. Supp. 840, reversed sub nom. United States v. State of Washington, 9 Cir., 233 F. 2d 811. [All footnotes are those of the court.]

seaward due to imperceptible accretion. On November 11, 1889, Washington was admitted to the Union as a state.

In holding that under the circumstances of this case the boundary between government-owned uplands and state-owned tidelands is the ordinary high-water mark as it was when Washington was admitted to the Union, the district court applied what it understood to be the local rule of property established in the state of Washington.[5] The Government contends that federal law instead of state law should have been applied, and that under federal law the title to the accretions must be held to be in the United States, subject to the Samson Johns trust patent.

In urging that federal law controls, the Government relies primarily upon the holding in Borax Consolidated, Ltd. v. Los Angeles, 296 U. S. 10. In that case, Borax Consolidated, claiming as upland owner under a federal patent, brought an action to quiet title to land alleged to be tideland situated in the inner bay of Los Angeles Harbor. It was apparently agreed that the company's land extended to the high-water mark, but there was controversy as to how this mark was to be determined. Declining to be bound in its determination by the defini-

[5] The district court's opinion on the first trial dealt with this question by way of dictum solely by reference to state statutes and state decisions; the court stating its prediction as to how the Washington Supreme Court would answer the question if confronted with it. United States v. Gas & Oil Development Co., supra, 126 F. Supp. at 844-45. The district court reached the same conclusion on the second trial without writing a further opinion.

tion of the term "ordinary high water mark" under California law, the court said:

> "The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. *Packer v. Bird*, 137 U. S. 661, 669, 670; *Brewer-Elliott Oil Co. v. United States*, 260 U. S. 77, 87; *United States v. Holt Bank*, 270 U. S. 49, 55, 56; *United States v. Utah*, 283 U. S. 64, 75. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. *Barney v. Keokuk*, 94 U. S. 324, 338; *Shively v. Bowlby, supra* [152 U. S. 1], p. 40; *Hardin v. Jordan*, 140 U. S. 371, 382; *Port of Seattle v. Oregon & Washington R. Co.*, 255 U. S. 56, 63." 296 U. S. at 22.

No question of accretions was involved in Borax, the problem being the ascertainment of the boundary between the upland and tideland as it existed at the time the company received its patent. But the principle there announced is equally applicable where the problem is one of determining whether imperceptible accretions go with the upland. If the upland owner is entitled to the imperceptible accretions it is because this is an attribute of title reserved to or obtained by grant from the Government. Thus the determination of the attributes of an underlying federal title, quite as much as the determination of the boundaries of the land reserved or acquired under such a title, "involves

the ascertainment of the essential basis of a right asserted under federal law."

Appellee cites a number of decisions which in its opinion call for the conclusion that state law governs under the circumstances of this case. One of these is Barney v. Keokuk, 94 U. S. 324, 337-38, in which the question concerned the ownership of land created by an artificial fill in the bed of a navigable river. The court applied federal law to the extent of determining that, no accretions being involved, the tidelands belonged to the state in its sovereign capacity and it was free if it chose but was not required to relinquish any part thereof to the upland owner. The same result was reached in St. Louis v. Rutz, 138 U. S. 226, also cited by appellee. In neither of these cases was imperceptible accretion involved; in both the court indicated that had it been involved a different result would have been reached.

Joy v. St. Louis, 201 U. S. 332, relied upon by appellee, did not involve lands in which the United States or its grantee held or claimed title. It involved riparian lands, the title to which was based on a Spanish concession and confirmatory acts of Congress. The circuit court held it was undisputed that the federal statutes merely confirmed whatever

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[1] Indicating that state law controls the question as to who may benefit from sudden accretions but not as to who may benefit from imperceptible accretions, the court said:

"It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each State decides for itself." 94 U. S. at 337.

title Spain had given; thus the extent of the title was not a federal question and the case was dismissed for lack of jurisdiction. Joy v. City of St. Louis, 122 Fed. 524. The Supreme Court affirmed, stating that under these circumstances the plaintiff's right to the accretions was a question of local law. 201 U. S. at 342.

Ker and Company v. Conden, 223 U. S. 268, and Zeller v. Southern Yacht Club, 34 La. Ann. 837, cited by appellee, did not involve lands the title to which was held by or derived from the United States. The Ker case arose in the Philippine Islands and involved accretions which under Spanish law became a part of the public domain of Spain. The United States, as successor to Spain, was held under Spanish law to have title to the accretions and the claim of the riparian owner, who did not derive title from the United States, was on that ground rejected. The Zeller case involved accretions to the uplands bordering Lake Pontchatrain in Louisiana. The controversy was between private parties and the opinion does not indicate that the Government had ever held title to either the uplands or shorelands.

Appellee has cited Western Pac. Ry. Co. v. Southern Pac. Co., 9 Cir., 151 Fed. 376, in which the company, holding by mesne conveyances from the state a strip of land between the high and low tide lines in San Francisco Bay, claimed by right of accretion a subsequently filled area extending farther seaward. The court rejected the claim. No riparian

title held by or derived from the United States was involved and there was accordingly no occasion to invoke federal law.

Port of Seattle v. Oregon & Washington R. Co., 255 U. S. 56; Mann v. Tacoma Land Co., 153 U. S. 273; and Shively v. Bowlby, 152 U. S. 1, all cited by appellee, involved the rights of riparian or littoral owners in and to tidelands. Since title to tidelands is in the state, the rights of riparian or littoral owners therein were properly held to present a question of local law. The right of an upland owner as an attribute of his title to imperceptible accretions along the shoreline was not involved.

During oral argument appellee called our attention to Water Power Co. v. Water Comm'r, 168 U. S. 349. The controversy there was as to the right of riparian owners to the use of the waters flowing by their property. No question of accretions was involved. State law was properly held to govern.

None of the cases relied on by the State detract from the principle announced in Borax Consolidated, Ltd. v. Los Angeles, 296 U. S. 10, which in our opinion requires that the question of whether imperceptible accretions go with the upland be determined in accordance with federal law when title to the uplands is in or derived from the federal government.

In Shively the court indicated that if the question involved title to gradual accretions, the general common-law rule which is the federal rule, would have governed. 152 U. S. at 35.

It is not here disputed that if, as we have held, federal law governs the question of title to the accretions, the determination must be in favor of the uplands held by the United States, subject to the rights of the heirs of Samson Johns.

The common law is the source of the tideland title which the United States held and which passed to the State of Washington when it was admitted to the Union. Federal law follows the common law in determining the measure of the title to lands retained by the United States. The Supreme Court has implicitly so recognized. At common law the person whose land is bounded by sea, lake or river owns any additions thereto resulting from imperceptible accretion.

In the case of tidal waters such as are involved here, the high-water mark means the line of high water as determined by the course of the tides, not as determined by physical markings made upon the ground by the water. The latter method of making this determination, which was followed by the district court, is appropriate only in the case of streams and other nontidal waters which have no absolute ascertainable level because of variations of flow from a multitude of causes.

As was testified to for the Government by the supervisor of the Northwest District of the United States Coast and Geodetic Survey, the definition of mean high tide is the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years. Borax Consolidated, Ltd. v. Los Angeles, *supra*, 296 U. S. at 26-27. This is an unchanging elevation, and the line of mean high tide is where that unchanging elevation meets the shore as it exists at any particular time.

The judgment is reversed.

CHAMBERS, Circuit Judge, concurring:

As the district court thought, I think the question of the line of the title ought to be decided by state law. But as I read Borax Consolidated, Ltd. v. Los Angeles, 296 U. S. 10, I think the road sign points to the line being treated as a federal question. So, I concur.

(Endorsed) Opinion and Concurring Opinion Filed Sep. 1, 1961.

FRANK H. SCHMID, Clerk.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 17,006

UNITED STATES OF AMERICA, *Appellant*,

vs.

STATE OF WASHINGTON, *Appellee*.

APPEAL from the United States District Court for the Western District of Washington, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered September 1, 1961.

APPENDIX E—STATE'S EXHIBIT K

Olympia, Wn., June 21, 1928.

Mr. Austin M. Wade, Prosecuting Attorney,
Aberdeen, Wn.

DEAR SIR:—You have asked whether or not any authority exists for the abatement as nuisances of certain shacks situated upon what is known as "No man's land" in your county. These shacks are occupied during the clam season by clam diggers and at other times by beachcombers, moonshiners and other classes of undesirables. "No man's land" consists of a strip of waste sands formed by accretions brought about by the construction of jetties at Grays Harbor. The government meander line runs along the upper edge of this strip. The line of ordinary high tide prior to the construction of the jetties practically coincided with the meander line. With the accretions referred to the line of ordinary high tide and that of extreme low tide as well gradually receded. The intervening alluvion has to all intents and purposes become upland but is largely waste and unfit for any profitable use.

At the outset it is necessary to consider the effect of Chapter CV, Laws of 1901. That act declares in section 1 that "the shore and beach of the Pacific Ocean including the area or space lying be-

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The opinion of the Attorney General of the State of Washington, as set forth herein, is taken from *Opinions of the Attorney General, State of Washington*, 1927-1928 (Nineteenth Biennial Report of the Attorney General, Olympia; Washington, Jay Thomas, Public Printer, 1929), pp. 779-781.

tween ordinary high tide and extreme low tide (as such shore and beach now are or hereafter may be) from the southerly point of Damon's Point on the north side of the entrance to Grays Harbor to the mouth of the Queets river, State of Washington, be and the same are hereby declared a public highway forever, and as such highway shall remain forever open to the use of the public.".

Section 2 of the act withdraws this area from sale or lease.

Section 3 provides that no lease or contract of sale now existing on or for any part or parts of said shore or beach shall be renewed or extended.

We believe that the legal effect of the language included within parentheses in section 1 of the act is to constitute the area covered by the accreted land a public highway just as much now as at the time the act was passed. The shore and beach, i.e., the area between extreme low tide and ordinary high tide in 1901 ran along the upper edge of this accreted strip and at that time was made a public highway, "as such shore and beach *now are*." With the gradual accretion of ocean sands the strip uncovered by the ebb and flow of the tide gradually receded to its present position, creating from time to time new area constituting a public highway by reason of the language "as such shore and beach . . . *hereafter may be*," but this gradual recession did not, in our opinion, have the effect of divesting the former area of its character as part of the public highway.

If this is not the proper interpretation of the act it seems to us that the legislature would have made some provision for disposal of this property. It would have evidenced an intention to restore the land to the public domain by modifying sections 2 and 3 to the extent those sections affect the accreted area.

In view of our above conclusion, we think it only necessary to direct your attention to section 2500, Rem. Comp. Stat. which makes "every act unlawfully done and every omission to perform a duty which act or omission * * * shall unlawfully interfere with * * * obstruct, or tend to obstruct * * * a public * * * highway * * * shall be a public nuisance" and sections 2502 and 2503 prescribing the remedy and also to section 9913, Rem. Comp. Stat., which makes it a public nuisance "to obstruct or encroach upon public highways" and sections 9920, 9922, 9923 and 9926 which outline the method of proceedure to secure its abatement.

Yours respectfully,

E. W. ANDERSON,
Assistant Attorney General

APPENDIX F

CHAPTER CV, LAWS OF 1901

AN ACT to make the sea shore or sea beach of the Pacific Ocean in Chehalis county, State of Washington, a public highway forever.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That the shore and beach of the Pacific Ocean including the area or space lying between ordinary high tide and extreme low tide (as such shore and beach now are or hereafter may be) from the southerly point of Damon's Point on the north side of the entrance to Gray's Harbor to the mouth of the Queets river, State of Washington, be and the same are hereby declared a public highway forever, and as such highway shall remain forever open to the use of the public.

SEC. 2. No part of said shore or beach shall ever be sold, leased or otherwise disposed of.

SEC. 3. No lease or contract of sale now existing on or for any part or parts of said shore or beach shall be renewed or extended.

SEC. 4. All laws or parts of laws of the State of Washington in conflict with this act, are hereby repealed.

[1] Laws of Washington 1901, pages 217-218
[2] Now codified as RCW 79.16.160
[3] Now codified as RCW 79.16.161
[4] Uncodified
[5] Uncodified

SEC. 5. An emergency exists and this act shall take effect immediately.

Passed the Senate February 18, 1901.

Passed the House March 13, 1901.

Approved by the Governor, March 16, 1901.

CHAPTER CX, LAWS OF 1901

AN ACT to make the sea shore or sea beach of the Pacific Ocean in Pacific and Chehalis countjes, State of Washington, a public highway forever, to provide for the cancellation of existing contracts of sale and lease of such seashore and sea beach, and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That the shore and beach of the Pacific Ocean, including the area or space lying, abutting or fronting on said ocean and between ordinary high tide and extreme low tide (as such shore and beach now are or hereafter may be) from the Columbia river or Cape Disappointment on the south to a point three hundred feet southerly from the south line of the government jetty on Peterson's Point, State of Washington on the north, be and the same are hereby declared a public highway forever, and as such highway shall remain forever open to the use of the public.

[1] Uncodified.
[2] Laws of Washington 1901, pages 225-226.
[3] Now codified as RCW 79.16.170.

SEC. 2. No part of said shore or beach shall ever be sold, conveyed, leased or otherwise disposed of.

SEC. 3. No lease or contract of sale now existing on or for any part or parts of said shore or beach shall be renewed or extended, nor shall any sale or conveyance of any part or parts of said shore or beach be made or executed under or by virtue of any such lease or any contract of sale.

SEC. 4. In any and all cases where any part or parts of said shore or beach has been sold or conveyed, or been contracted to be sold or conveyed, or has been leased by the State of Washington to any person or corporation, any such person, or his heirs, executors, administrators or assigns, or any such corporation or its successors or assigns, may re-convey to the State of Washington such part or parts of said shore or beach so sold or conveyed by the State of Washington, or surrender for cancellation any such contract or lease, and thereupon the Commissioner of Public Lands of the State of Washington is hereby authorized and directed to cancel such contract or lease, and to refund or cause to be refunded any moneys received by the State of Washington on account of such sale, conveyance, contract or lease.

Now codified as RCW 79.16.171
Unmodified
Unmodified

SEC. 5. All laws and parts of laws of the State of Washington in conflict with this act are hereby repealed.

SEC. 6. An emergency is hereby declared to exist, and this act shall take effect immediately.

Passed the Senate February 18, 1901.
Passed the House March 13, 1901.
Approved by the Governor March 16, 1901.

CHAPTER 78, LAWS OF 1929[1]

AN ACT relating to certain public lands and providing for the sale thereof.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. The commissioner of public lands is hereby authorized to offer for sale and sell in the manner hereinafter provided, all, or any portion of, the following described lands:

All lands owned by the state bordering on the Pacific Ocean from the southerly point of Damon's Point on the north side of the entrance to Gray's Harbor to the mouth of the Queets river and from the line between Pacific and Grays Harbor counties on the south to a point 300 feet southerly from the south line of the government jetty on Peterson's Point on the north and lying above and on the land

[1]Uncodified.
[1]Uncodified.
[1]Laws of Washington 1929, pages 131-132, uncodified.

side of the inner boundary of the highway reservations made by chapter CV and chapter CX, Laws of 1901, same being a line of ordinary high tide as the same is now located or as it may hereafter exist.

SEC. 2. Whenever application is made to purchase any of such lands, or whenever the commissioner of public lands shall deem it for the best interest of the state to offer any of such lands for sale, he shall cause a notice to be personally served upon the abutting upland owner if he be a resident of this state, or if the upland owner be a non-resident of this state, shall mail to his last known post office address, a copy of a notice notifying him that application has been made for the purchase of such lands or that the commissioner deems it for the best interest of the state to sell the same, as the case may be, giving a description and the value thereof as the same may be determined by an appraisal thereof made by the commissioner of public lands, and in no case less than five dollars ($5.00) per lineal chain frontage, and notifying such upland owner that he has a preference right to purchase such lands at the appraised value thereof thirty days from the date of the service or mailing of said notice; and no such lands shall be offered for sale, or sold to any other person than the abutting upland owner until after the expiration of said thirty days from the date of the service or mailing of such notice. If the upland owner is a non-resident of this state and his address is unknown to the commissioner of public lands,

notice to him shall not be necessary or required. If at the expiration of the thirty days from the service or mailing of the notice, as above provided, the abutting upland owner has failed to avail himself of his preference right to purchase and has failed to pay to the commissioner of public lands the appraised value of the lands described in such notice, then in that event said lands may be offered for sale and sold in the manner provided for the sale of state lands, other than capitol building lands.

Passed the House February 7, 1929.
Passed the Senate February 27, 1929.
Approved by the Governor March 7, 1929.